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HAROLD B. WILLEY,

In The
Supreme Court Of The United States
OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR APPELLANTS

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OPINIONS BELOW

Opinions below were not reported.

Two letter-opinions of the Circuit Court of the City of Richmond are set forth in the Record on pages 50-52 and 100-101.

The order of the Virginia Supreme Court of Appeals refusing an appeal, and affirming the decision of the Circuit Court, is set forth in the Record at page 148.

The Virginia State Milk Commission submitted the record on the question without opinion; see Record at pages 99-100.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on January 26, 1953 (R. 148). A petition for appeal was presented to the Supreme Court of Appeals of Virginia on April 20, 1953; but was refused on April 21, 1953 (R. 149-150). Chief Justice Vinson granted an appeal on April 23, 1953 (R. 151). The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, U. S. Code, Section 1257. The Court noted probable jurisdiction on October 12, 1953.

QUESTION PRESENTED

Where an order of the Virginia State Milk Commission fixes minimum milk prices under State statute, for milk sold to consumers in Arlington County, Virginia, by District of Columbia distributors who transport such milk by trucks directly from their processing plants in the District of Columbia to the consumers in Arlington County; is such price-fixing order, and its application to such sales, in violation of the Commerce Clause of the United States Constitution and contrary to the occupancy of the field under provisions of the Federal Marketing Agreement Act of 1937, as amended, Title 7, U.S. Code, sections 601 et seq., particularly section 608 (c).

STATEMENT

This controversy was precipitated by the above-described

Order No. 4 of the State Milk Commission, issued on January 17, 1951, effective January 21, 1951 (R. 32), unexpectedly increasing retail prices for milk delivered in Arlington by District of Columbia distributors following a hearing which had not covered this subject (R. 1-2, 49, 50-51, 52).

Using the statutory procedure for judicial review under the Milk and Cream Act, the Arlington County Board and its members filed a petition for appeal (R. 1-5) in the Circuit Court of the City of Richmond, Virginia, contending that most of the milk purchased from District of Columbia distributors, by Arlington consumers, was moving in interstate commerce, and that the Virginia Milk Commission had no jurisdiction to regulate prices of such milk moving in interstate commerce by reason of the following provision of the Virginia Milk and Cream Act (Section 3-381 of the 1950 Virginia Code):

> "No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto."

Not only was the contention made that the State Milk Commission had no authority because of the Commerce Clause of the U. S. Constitution, but also that the regulation was not in conformity with the Federal Marketing Agreement Act of 1937, which also provides for Federal regulation of milk prices. Annexed to the petition filed in the Circuit Court of the City of Richmond were certified copies of orders of the U. S. Secretary of Agriculture, which had established minimum price regulation of farmer-producer prices in the Washington area, which included Arlington, effective No-

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vember 3, 1945. Federal regulation of such prices ended on March 31, 1947, as a result of a vote of the farmer-producers in accordance with section 608 (c) (16), Title 7, U. S. Code (R. 67-31, 83-84), (Orders are cited as 10 F.R. 13581 and 12 F.R. 2087.) Extracts from the Virginia and Federal Statutes are set forth in Appendices A and B of this brief.

A hearing was held by the Circuit Court of the City of Richmond, following which the matter was remanded to the State Milk Commission for further hearing as to facts in regard to the question of the milk moving in interstate commerce. See letter opinion of September 26, 1951, and decree of October 9, 1951 (R. 50-55).

A further hearing was held by the State Milk Commission on October 10, 1951. (R. 55-98) It was attended by representatives of Arlington County, the State Milk Commission, the producers, and distributors located in both Virginia and the District of Columbia (R. 70). It is of interest to note that for convenience the hearing was held in the District of Columbia (R. 71). Most of the facts were given by the two leading District of Columbia distributors and by the State Milk Commission (R. 71-98). However, the distributors and producers have not formally intervened. Afterwards, the State Milk Commission received memorandum briefs, but certified the record to the Circuit Court without opinion and without changing the order (R. 99-100).

On this record at the hearing, the State Milk Commission announced its interpretation of the scope of its authority and the application of the price-fixing order, as follows (R. 94-95):

> "The regulations for the Arlington-Alexandria market have been filed as part of these proceedings.

> They of course speak for themselves, but in any possible clarification as to the administrative practice with reference to them we will state that any sales by a producer to a distributor whose plant is located in Virginia are considered to come within the scope of the regulations.
>
> "Those that are made to the distributors whose plants are in Washington do not . . .
>
> ". . . As far as sales from distributors to either stores or homes, doorstep deliveries, we consider any such transactions as may occur within the Arlington-Alexandria market area as defined in the regulations to be under the control of the Milk Commission and to come within the scope of these regulations as regards to the pricing as set forth in the regulation."

At all times in this case, the State Milk Commission and its counsel, the Attorney General of Virginia, and the distributors, have taken the position that milk deliveries in Arlington from District of Columbia distributors are subject to price-fixing by the Virginia Commission. (R. 49-50. 77, 131)

At the further hearing, facts were developed that about two-thirds of the milk sold in the Arlington-Alexandria Market came from District of Columbia distributors (R. 86, 99). Milk produced for the area came 48.73 percent from Virginia, 48.25 percent from Maryland, 1.45 percent from West Virginia, and 1.57 percent from Pennsylvania (R. 98). About 50 to 60 percent of the sales of the two leading District of Columbia distributors were "retail", i.e., to consumers' doorsteps, the remainder was wholesale to stores, restaurants, schools, and the like (R. 79). About 75 percent of the retail home deliveries were on a pre-order basis, the remainder were changes in orders arranged between the

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consumers and the delivery drivers (R. 74, 81). About one-half of the consumers paid their monthly bills by checks sent to the distributors (R. 74, 82). About 40 to 50 percent of wholesale deliveries are on a pre-order basis from the two leading District of Columbia distributors (R. 79-81). These facts are of importance, because the State Milk Commission has contended that the deliveries of distributors are all intrastate "peddling" transactions in Virginia, and subject to State price regulations (R. 132-134).

After filing of the supplementary record (R. 99-100), the Circuit Court issued a second letter-opinion under date of June 20, 1952 (R. 100-101), sustaining the order of the Milk Commission, saying:

> "Due consideration has been given the supplemental record and the memoranda submitted by counsel. Under the authorities cited therein as applied to the facts in this case, the court is of opinion that the minimum price regulation in question is not a burden on interstate commerce; that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained."

The decree (R. 101-102) applied this ruling "irrespective of the point of origin of the milk so delivered."

Following entry of an order in the Circuit Court, the Arlington County Board appealed to the Virginia Supreme Court of Appeals substantially on the same grounds presented here to the U. S. Supreme Court (R. 102-128). The Attorney General of Virginia opposed the appeal on its

merits, on behalf of the State Milk Commission; not involved were any procedural technicalities (R. 128-148). After a brief ex parte presentation by counsel for appellant, the appeal was refused by order entered January 26, 1953, expressly affirming the judgment of the Circuit Court and saying that it was "plainly right". (R. 148)

The Arlington County Board is a body corporate with specific right to sue and be sued, and empowered to take such measures as it may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of said county. The members of said Board, who were individually named as complainants in the original action, were and their successors are individual consumers of milk in Arlington County. The Board appropriates funds to buy milk for its jail and schools (R. 1-5, 74). Its ordinance regulates sanitation standards for milk. The county is competitive with other parts of the Washington Metropolitan area, and its prosperity requires that it be free from restraints not imposed in other areas. As elected representatives of the people, and responsible to them and spending tax funds, it brings this appeal to carry out its statutory functions of bringing suit to protect the general welfare of its people.

The relief sought by the Arlington County Board is an order from the State Courts declaring the regulation of interstate commerce to be beyond the authority of the State Milk Commission and that the Commission be required to revise its rules and regulations to exclude regulation over interstate commerce (R. 4-5).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Appeals of Virginia erred:

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1. In affirming the decree of the Court below entered on July 22, 1952, by the Circuit Court of the City of Richmond, Virginia, and in refusing an appeal from such decree by which the said Circuit Court upheld the validity of an order of the State Milk Commission of the Commonwealth of Virginia increasing prices of milk in Arlington-Alexandria Market Order No. 4 which was the subject of that proceeding.

2. In holding that the said Circuit Court was "plainly right" in its decree and in its letter-opinion under date of June 20, 1952, in which the said Circuit Court held "that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained."

3. In holding that the said Circuit Court was "plainly right" in said decree and in said opinion in which the Circuit Court held "that the minimum price regulation in question is not a burden on interstate commerce".

4. In failing to grant an appeal and held that the said order of the State Milk Commission was in violation of the Commerce Clause of the United States Constitution (Article 1, Section 8, Clause 3); and, hence that said order of the State Milk Commission was beyond its jurisdiction.

5. In failing to grant an appeal and held that the field of milk price regulation in the Arlington-Alexandria Market Area, under said Commerce Clause of the United States Constitution, had been occupied by the United States Government under an Act of Congress (7 U. S. Code, sec. 601 et seq. particularly section 608 (c) to the exclusion of regulatory jurisdiction by the State Milk Commission of the Commonwealth of Virginia in said area.

SUMMARY OF ARGUMENT

Appellant contends that regulation by the Virginia State Milk Commission of prices for milk sold to consumers in Arlington County, Virginia, by District of Columbia distributors who transport such milk by trucks directly from their processing plants in the District of Columbia to consumers in Arlington County, is in violation of the Commerce Clause of the U. S. Constitution, and is unauthorized and contrary to the occupancy of the field under provisions of the Federal Marketing Agreement Act of 1937, as amended, Title 7, U. S. Code, sections 601 et seq., particularly section 608 (c).

The decisions of the Virginia Courts are contrary to three prior decisions of the United States Supreme Court in milk cases. This Court held in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, affirming 17 F. Supp. 511, that this same Virginia statute in question did not regulate sales of milk from District of Columbia distributors to Virginia stores; and the District Court held regulation of this traffic would be in violation of the Commerce Clause. In *Baldwin* v. *Seelig*, 294 U. S. 511, this Court condemned New York regulation of prices paid Vermont producers by New York distributors, because of the impediment upon interstate commerce. In *Hood and Sons* v. *Du Mond*, 336 U. S. 525, this Court held that New York could not deny a license for establishment of a receiving plant in New York for export of milk to Massachusetts, because such regulation was in violation of the Commerce Clause and was not authorized by the Federal Marketing Agreement Act. This Court held that it was the intention of Congress that interstate traffic in milk should be free from economic impediments by States, and that such State regulation was not authorized by the Federal statute.

Federal regulation of milk prices paid producers was effective from November 1945 to March 1947, but was cancelled because of a vote of more than 50 percent of the producers to eliminate the Federal regulation. Under Federal regulation there was power to regulate interstate producers' prices, *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110. The Virginia Milk Commission also regulates producer prices, although not those paid by District of Columbia distributors. The State Milk Commission regulates retail and wholesale prices but they are necessarily predicated upon producer prices whether interstate or intrastate, and one would affect and indirectly regulate the other. The State Milk Commission cannot fill the void, and regulate interstate commerce. Where there is no cooperative or coordinated regulation, the State regulation of producer, wholesale, and retail prices invades the field occupied by Congress; and the State regulation is unauthorized and contrary to the Commerce Clause.

Virginia Courts erred in upholding jurisdiction of the State Milk Commission over interstate milk because of the State Courts' misconception of what constitutes "burden upon interstate commerce". This is not a situation where exercise of State powers indirectly or incidentally affects interstate commerce. This is a situation largely of interstate commerce, involving sale, transportation, and delivery of milk directly across the State lines in interstate commerce, involving economic impediments subject only to the regulatory power of Congress. The "delivery" and "sale" are not separable parts of the interstate movement and are not intrastate commerce. As most deliveries were on a pre-order basis, they were not intrastate "peddling" operations as appellee has contended.

The Virginia Milk and Cream Act does not authorize

regulation over interstate traffic in milk from District of Columbia distributors directly to Arlington consumers. The Virginia Milk Commission has no authority from Congress to regulate interstate milk prices, particularly in the absence of Federal regulation which was frustrated by vote of the producers in 1947. Virginia regulation of interstate commerce in milk violates of the Commerce Clause of the United States Constitution.

ARGUMENT

I

The Decisions of the Virginia Courts are Contrary to Prior Decisions of the U. S. Supreme Court.

The decisions of the Virginia Courts in this case are contrary to a prior decision of this Court which interpreted this same statute, involving milk sales for this same area, in *Highland Farms Dairy* v. *Agnew,* (1936), 300 U. S. 608.

In the cited case, "Highland" corporation, a distributor in the District of Columbia, sold and delivered milk to retail stores owned individually by Luther High in the Arlington-Alexandria area. Neither Highland nor High complied with requirements of the Virginia Milk and Cream Act, and the State Milk Commission threatened to enforce the act against High's retail sales. "No proceedings against Highland were begun or threatened, the Commission taking the position that Highland was not subject to the prohibitions of the statute, its sales and purchases in Virginia being in interstate commerce. In spite of this disclaimer, Highland joined with High in suing to enjoin the enforcement of the Act." (300 U. S. 611.) In its decision this Court said (at pages 614-615):

"Argument . . . (that there was a burden on in-

terstate commerce) is built upon the definition of the word 'distributor' contained in § 1. We learn from that section that distributors include 'persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market, or handle milk for resale as fluid milk in the Commonwealth of Virginia.' This definition, we are told, takes in the plaintiff Highland, who buys milk and sells it in interstate commerce, and does so with the expectation that upon arrival in Virginia the milk will be resold. But Highland is not subject to the provisions of the act, and so the Milk Commission has ruled. No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the boundaries of a designated market area. The sections quoted in the margin point fairly to that conclusion. Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale. Cf. *Wiloil Corp.* v. *Pennsylvania*, 294 U.S. 169, 175; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511. If there could be any doubt about this as a matter of construction, the doubt would be dispelled by the administrative practice and by the warning of the statute, expressed in § 14, that operations in interstate commerce shall not be deemed to be affected. So also as to the requirement of a license expressed in § 4. High needs a license to the extent that he sells at retail to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business as now conducted with persons in Virginia is interstate

exclusively. Clumsy draftsmanship may have spread a fog about the section when viewed in isolation or taken from its setting. The fog scatters when we recall the provisions of § 14 and the administrative practice. Appellants' fears are visionary."

The 3-Judge District Court said of the same contention stated above (17 F. Supp. 575,):

"If the act is given this meaning, it is doubtless invalid as a direct and unconstitutional burden on interstate commerce. In *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511; 55 S. Ct. 497, 79 L. Ed. 1032, 101 A.L.R. 55, the Supreme Court held that a law or regulation of the state of New York was invalid, as a violation of article 1, sec. 8, cl. 3 of the Constitution, which prohibited the sale of milk imported from another state unless the price paid therein to the producer was equal to the minimum prescribed by New York for purchases from local producers. We think that the act does not have the meaning attributed it, although the language of the sections under discussion give some support to the complainants' argument; for when the act is considered as a whole, including the admonition of section 14 that no provision of the act shall be construed to apply to foreign or interstate commerce except in so far as the same may be effective pursuant to the United States Constitution. It is seen that the act was not designed to apply to a distributor beyond the state either as to prices or licenses."

But there has been a complete "about-face" by the Virginia State Milk Commission since the *Highland* case. The Commission now holds that these sales from distributors

to stores, as well as retail customers, are subject to State price regulation; and the Commission so stated at the hearing in this case (R. 95). There is no essential difference in principle, however, between the retail to consumers and wholesale sales to stores from distributors. See *Schollenberger* v. *Pa.*, 171 U. S. 1, 24, and the principle of the *Highland* case should be applied to distributors' sales to consumers, as involved in this case, as well as to stores.

The contrariness of the Virginia Milk Commission should result in either of two conclusions: (1) If the prior interpretation of the Virginia statute is to be followed, then the State Milk Commission obviously has no statutory power to regulate prices of milk sold by District of Columbia distributors directly to consumers or stores. (2) On the other hand, it now asserts its authority to regulate the very prices which the District Court specifically held would be a violation of the Commerce Clause. Hence in either situation the order of the State Milk Commission would be invalid under the *Highland* case.

In the *Highland* case, the 3-Judge District Court and this Court relied upon *Baldwin* v. *Seelig*, 294 U. S. 511. In that case this Court held that New York could not constitutionally prohibit sales of milk, bottled in New York, because the distributor violated New York regulations by paying less for the milk to Vermont farmer-producers than prescribed under the New York Control Act for New York farmer-producers. The difference between that case and this Virginia situation is only that Virginia attempts to regulate the retail prices, while New York tried to prohibit retail sales of milk for which the distributor paid the Vermont producers less than New York wholesale prices. The policy and principles stated by the Supreme Court of the United States in that case would apply equally to both situations; and the Supreme Court has said:

"Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." (294 U. S. 522)

* * * * * * * *

"Commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product." (294 U. S. 524)

* * * * * * * *

"What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competi-

tion from without and leading inescapably to the suppression so intended."

"The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition. To overcome that competition a common incident of ownership—the privilege of sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter . . ." (294 U. S. 527)

* * * * * * *

". . . It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, whether in the original package or in others, unless the scale has been observed." (294 U. S. 528)

In *Hood & Sons* v. *Du Mond*, 336 U. S. 525, a New York commission denied a distributor's license to purchase milk in New York for export to Massachusetts. The Supreme Court of the United States held this to be contrary to the Commerce Clause of the Constitution of the United States, and said:

> "*Baldwin* v. *Seelig*, 294 U. S. 511, is an explicit, impressive, recent and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone. This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of health and safety." (366 U. S. p. 535)

The Court in that case pointed out that the Commerce Clause contains one of the important guarantees of freedom in the Constitution, saying (p. 539):

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

Appellants in this case are claiming this guarantee of freedom, and ask that the Court give it reality.

Also in *Hood and Sons* v. *Du Mond*, supra, this Court held that the New York regulation was not only in violation of the Commerce Clause, but also that it was "not authorized by federal legislation pursuant to the Clause." (336 U. S. 545) In the next part of the argument of this

Brief, the Court is asked to reach the same conclusion as to the Virginia price regulation in this case.

II

The Virginia Courts Erred in Failing to Recognize Occupation In the Field of Regulation by Act of Congress.

While the initial complaint in this proceeding specifically raised the question of Federal occupancy of milk price regulation, the Virginia Courts have completely ignored the matter.

There was Federal milk price regulation in the Arlington-Alexandria area, effective November 3, 1945 (R-6A to 27, 10 F.R. 13581). By vote of the producers, this regulation was discontinued, effective March 31, 1947 (R-28A to 31, 12 F.R. 2078). The revocation upon vote of more than 50 percent of the producers was in accordance with the Federal Marketing Agreement Act, 7 U.S.C. section 608 (c) (16) (B). There is nothing in this Act, however, which indicates that State regulation should be substituted while the Federal regulation is dormant, nor is there anything in the Federal Act indicating that the producers may choose between Federal and State regulation. It would seem that the choice given producers by Congress has been between either Federal regulation or no regulation in interstate commerce.

The Federal statute requires the Secretary of Agriculture to establish initial milk prices for farmer-producers upon the equivalent purchasing power of a base period, with authority to revise the prices under changed economic conditions and also to "insure a sufficient quantity of pure and wholesome milk, and be *in the public interest*". (See Title 7 U.S.C., section 608 (c) (18), emphasis added.)

Section 601 of the Federal statute (Title 7 U.S.C.) provides:

> "It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce."

This statute was given the following interpretation by the U. S. Supreme Court in *Hood & Sons* v. *Du Mond*, supra, (336 U. S. 544-5):

> "These sections and reports indicate that it is the deliberate policy of Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. While a statutory prohibition against federal interference with certain phases of it may not always imply that the state too is precluded, it is obvious that a state limitation on export for the benefit of its own consumers is not authorized by this Federal Act. The purpose as expressed in sec. 1., 7 U.S.C. sec. 601, is to avoid conditions which burden and obstruct the normal channels of interstate commerce. The object of the federal program to raise and stabilize the price of products was to stimulate interstate commerce. The order of the Commissioner avows itself to have the opposite effect. It can claim neither federal sponsorship nor congressional sanction.

In the instant situation, we have State regulation of retail prices asserted in the field of direct movements in interstate commerce, and ouster of Federal regulation by vote of the producers, with the substitution of State regulation over interstate commerce.

The Federal and Virginia statutes are different in that the State statute authorizes direct regulation of retail prices, and maximum as well as minimum prices to consumers, while the Federal regulation provides for protection of the consumer "in the public interest" in an indirect manner. But the fact that regulation is different, or complementary, does not result in the conclusion that some portion of the field has been left open to the States; see *Hines* v. *Davidowitz*, 312 U. S. 52, 66-71 in which the Court said:

> "And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."

In Virginia, of course, the regulation of retail milk prices in interstate commerce indirectly regulates the prices paid to producers, which the Federal legislation would directly regulate. These differences go to the methods of regulation, however, rather than to the purpose of the regulation or to the completeness of the schemes. But the differences of method do not authorize State action. In *First Nat. Ben. Soc.* v. *Garrison*, 58 F. Supp. 972, 155 F. 2d 522, the District Court said:

> "When Congress exercises its exclusive powers over interstate commerce, the states cannot legislate on the subject, and the situation is covered as much by what is not done by Congress or the Interstate Commerce Commission, as by the regulations it has made, and the State has no power to fill what it may regard as a

hastus left by Congress and the Interstate Commerce Commission."

The fact that the Federal regulations have not been made effective does not result in conferring jurisdiction upon the State. Occupancy of the field by the Federal government is made by legislation, as shown by the following:

"The federal and state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power." See *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 612-3.

"It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that can not be given to the federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the federal law in force, state action is illegal and unwarranted." *Oreg.-Washington Co.* v. *Washington*, 270 U. S. 87, 101-2

Neither does the silence of Congress authorize the States to regulate interstate commerce; this Court has said:

> "Nothing which is a direct burden upon interstate commerce can be imposed by the State without assent of Congress, and . . . the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." *Brennan* v. *Titusville*, 153 U. S. 299, 302.
>
> "Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity, or by that means of transportation shall be free." *Bowman* v. *Chicago*, 125 U. S. 465, 485.
>
> "The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that the particular commerce shall be free from regulation." *Missouri* v. *Kansas Gas Co.* 265 U. S. 298, 308.

The relation between the Agricultural Marketing Agreement Act and State regulation has been an issue in two cases, one involving raisins, the other milk. In *Parker* v. *Brown*, 317 U. S. 341, the U. S. Supreme Court upheld the regulation of raisin prices paid California producers by California processors, partly because it "applied to transactions wholly intrastate" and also partly because of the following circumstances (317 U. S. 358-9):

> "We have no occasion to decide whether the same conclusion would follow if the state program had not been adopted with the collaboration of officials of the Department of Agriculture and aided by loans from

> the Commodity Credit Corporation recommended by the Secretary of Agriculture."

Conversely, in *Hood and Sons* v. *Du Mond*, supra, this Court concluded that State restriction of milk imports was contrary to the Federal statute. In that case this Court pointed out that Section 10 of the Agricultural Marketing Agreement Act (7 U.S.C. 610 (i)) provides for conferences, joint hearings, and cooperation with State authorities. This court then said (336 U. S. 542-3):

> "And the provisions looking to state cooperation may be sufficient to warrant the state in imposing regulations approved by the federal authorities, even if they otherwise run counter to the decisions that coincidence is as fatal as conflict when Congress acts. See *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767. It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity."

We do not have a cooperative situation in this case. If anything there is lack of cooperation. The producers, by their vote, have frustrated Federal regulation. In such a situation, it would seem intolerable that the State should regulate any interstate commerce in milk within this area.

Regulation of interstate retail prices inevitably depends upon the interstate producer prices. The Virginia Milk Commission does set producer prices (R-32, 37 to 40). While it says that there is no regulation of producer prices paid by District of Columbia distributors (R-95), it is

difficult to see how it could compute retail and wholesale prices for interstate milk unless on the basis of the prescribed producer prices, particularly as it requires the Virginia distributors to pay such producer prices.

On the other hand, if there were Federal regulation of producer prices, the interstate producer prices would affect retail prices whether intrastate or interstate. This Court has held that, under the Federal Statute, the Secretary of Agriculture can regulate intrastate producer prices because of their effect upon interstate commerce in the same area; see *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110. Therefore, any regulation of retail or wholesale prices, interstate or intrastate in the Arlington area would begin with Federal regulation of producer prices both interstate and intrastate, if there were Federal regulation.

Because of the interrelation of producer prices and the retail and wholesale prices, the State Milk Commission necessarily invades the field occupied by the Federal government in regulating any prices in interstate commerce. Only after exercise of the Federal regulation of producer prices could there be any beginning of State regulation without actual occupancy of the Federal field by the State Milk Commission.

The prior regulation of milk in the Arlington area under the Federal statute, the ouster of such regulation by the producers, and the movement in interstate commerce of most of the milk consumed in the area, should be facts leading to the conclusion that there should be no price regulation of milk traffic in interstate commerce, at least not until the Federal statute should be made effective in the Arlington-Alexandria market area.

III

The Decisions of the Virginia Courts were Based Upon an Erroneous Misconception of the Scope of State Powers to Regulate Interstate Commerce.

The error of the Virginia Courts is believed to have been due primarily to a misconception of the rule, which it followed in this case, that the milk "price regulation in question is not a burden on interstate commerce".(1)

There are extremes in the use of the "burden" rule: On the one hand, there is an extreme view that the States are prohibited from any jurisdiction over interstate commerce. On the other hand, there is the view that a State may regulate any and all interstate commerce so long as the regulation is not burdensome in the sense of being unreasonably oppressive or discriminatory. The Virginia Courts have come close to this latter view in prior decisions reversed by the U. S. Supreme Court. See *Nippert* v. *Richmond*, 327 U. S. 416, reversing 183 Va. 689, 33 S.E. 206; and *Morgan* v. *Virginia*, 328 U. S. 373, reversing 184 Va. 24. As the Virginia courts did not explain their views by an opinion in this milk case, there is no way of knowing whether their conclusion was not based upon views similarly erroneous.

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(1) In a one-paragraph memorandum in this case (R-148) the Virginia Supreme Court of Appeals affirmed a memorandum decision of the Richmond Circuit Court which merely said (R-100 and 101):

> ". . . the court is of opinion that the minimum price regulation in question is not a burden on interstate commerce; that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors . . ."

The Court's decree (R-101 and 102) stated that this applied "irrespective of the point of origin of the milk so delivered". The State Milk Commission, after hearing the matter specially on the interstate commerce question, had certified the record to the Richmond Circuit Court without opinion (R-99).

The fundamental principle, established by the Opinion of Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, has been that the Commerce Clause is a guarantee of freedom of trade among the States. "The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states". *Memphis Stern Laundry* v. *Stone*, 342 U. S. 389, 395. However, if the rule should be established that States may impose price regulation at the crossing of their boundaries, the people will lose another freedom.

Price-fixing is the antithesis of free trade, and the States should not impose price regulation upon commodities crossing their borders unless authorized by Congress to do so. This principle wuld be consistent with the following rule stated by this Court in *Freeman* v. *Hewit*, 329 U. S. 249, 252; which explains this lack of State authority:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause, even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761; *Morgan* v. *Virginia*, 328 U. S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow

> of trade between the States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."

See also: *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 307-8; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 58-61; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189; *McLeod* v. *Dilworth*, 322 U. S. 327, 349; *Spector Motor Service* v. *O'Connor*, 340 U. S. 602.

Some of the cases state, as in the above quotation, that the field in which the States cannot act is that in which the interstate commerce is "national" in character. But the term "national character" has been defined to include transportation, purchase, sale, and exchange of commodities moving directly in interstate commerce. The following cases support that rule:

> "Interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities is national in its character, and must be governed by a uniform system," and "so long as Congress does not pass any law to regulate it, or allowing the States so to do it thereby indicates its will that such commerce shall be free and untrammelled." *Leisy* v. *Hardin*, 135 U. S. 100, 109-110.
>
> " 'Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by

provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists of the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its nonaction in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity, or by that means of transportation shall be free." *Bowman* v. *Chicago*, 125 U. S. 465, 485.

The distinguishable situations in which a State may regulate interstate commerce as an incident to State regulation should be concerned primarily with the commodity *before* or *after* it has been transported; and the States cannot regulate the incidents of the importation. The distinction is made in the following statements of the U. S. Supreme Court:

"But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed *after* coming within the State, but directly upon the business as it comes into the State from without or goes out from within." *Hall* v. *DeCuir*, 95 U. S. 488, 488-9. (Emphasis added.)

"It is enough to say, that the power to regulate or forbid the sale of a commodity *after* it has been brought into the State, does not carry with it the right and

> power to prevent its introduction by transportation from another State." *Bowman* v. *Chicago,* 125 U. S. 465, 500. (Emphasis added.)

Counsel for the State Milk Commission have, in prior proceedings cited cases, in supposed support of their position, which are readily distinquished for the same reason, that the State regulation applied before the interstate movement began. There is *Milk Board* v. *Eisenberg,* 306 U. S. 346, which upheld State regulation of prices paid Pennsylvania producers by Eisenberg company, a Pennsylvania corporation, at its Pennsylvania receiving plant. This regulated transaction was entirely within Pennsylvania, although the milk was later exported to New York. In that case the U. S. Supreme Court said:

> "There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is *incidental* and not forbidden by the Constitution in the absence of regulation by Congress." (p. 353.)

There was also the case of *Parker* v. *Brown,* 317 U. S. 341 involving California regulation of prices of raisins paid to California processors. In that case the Court said (317 U. S. 361):

> "Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins *before* they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate *before* the

raisins are ready for shipment in interstate commerce." (Emphasis added.)

These cases are distinguishable from the instant situation where the Virginia price regulation applies directly to the importation of milk.

Counsel for the State Milk Commission in prior arguments have contended that the District of Columbia distributors were "peddling" milk in Arlington in intrastate commerce. They have cited two cases in support of their contention: *Wagner* v. *Covington*, 251 U. S. 95 and *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117. But these cases really are contrary to the State's position.

Both of the cited cases involved imposition of taxes, one upon a peddler of soft drinks, the other upon a peddler of bread. In both decisions the U. S. Supreme Court emphasized, in almost identical language, that these statutes did not license or tax the activity or transporting the goods across State lines, but rather the purely local business of peddling intrastate *after* the goods were imported (see 251 U. S. 103 and 313 U. S. 119). In both of those cases the sales solicitations and subsequent sale transactions were in the State where the sale and peddling took place.

But in this case the facts are much different. Here the District of Columbia milk distributors did business largely on a pre-order basis before the movement of the milk began across the State boundary. The record shows that about 75 percent of the retail home deliveries filled pre-orders for regular deliveries; the remainder were largely changes in pre-orders, arranged between the consumer and the delivery driver; and about one-half of the consumers paid their monthly bills by checks sent to the distributors in the District of Columbia. About 40 to 50 percent of the wholesale

delivery orders were on a pre-order basis from the two leading District of Columbia distributors. Obviously this business was largely pre-order rather than local peddling.

In the earlier of the two cases previously relied upon by appellee, the U. S. Supreme Court said (251 U. S. 100):

> "It is indisputable that with respect to the goods occasionally carried upon plaintiffs' wagon from one State to the other in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce, not subject to the licensing power of the Kentucky municipality."

Therefore, the cases upon which appellee has relied are contrary to its position, and support the contention of appellant in this case.

Counsel for the Virginia State Milk Commission also have attempted to take the position that after the milk crosses the Potomac River and comes into Virginia the movement in interstate commerce ends; and that the subsequent delivery or sale to the consumer even on a pre-order, is not in interstate commerce. There is not enough in the opinions of the State courts to know to what extent the State courts may have agreed with this theory. But an attempt to divide a movement, which was physically and commercially continuous, is obviously erroneous in law and inconsistent with the facts in the case.

The position of the State Milk Commission depends upon an erroneous conception of the status of the sale which is part of the direct movement in interstate commerce from the District of Columbia to Virginia. The fundamental principle was early established as set forth in *Brown* v. *Maryland*, 12 Wheat. 419, in which the U. S. Supreme Court said (446):

> "Commerce is intercourse—one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic . . . should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part."

The same rule was followed in *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282. That case raised an issue of validity of a Kentucky statute which made unenforceable contracts by corporations not authorized to do business in the state. The corporation in that case sued for breach of contract made in Kentucky to deliver wheat grown in Kentucky on board rail cars at a Kentucky origin, but which the corporation intended to move to its mill in Tennessee. The State court held the contract to have been in intrastate commerce and unenforceable, but the U. S. Supreme Court held to the contrary, saying that it was in interstate commerce (257 U. S. 292), and further stated (257 U. S. 290-1):

> "Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown* v. *Maryland,* 12 Wheat. 419, 446-447; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *American Express Co.* v. *Iowa,* 196 U. S. 133, 143. This has been recognized in many decisions construing the commerce

clause. Thus it was said in *Welton* v. *Missouri,* 91 U. S. 275, 280: 'Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all forms, including the transportation, purchase, sale, and exchange of commodities.' In *Kidd* v. *Pearson,* 128 U. S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 241, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last.

"A corporation of one State may go into another without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause." . . .

Obviously, under this rule, the direct delivery of milk to Arlington consumers from District of Columbia distributors, following prior agreements for such deliveries between distributors and consumers, is part of interstate commerce.

The movement of milk from the District of Columbia to Arlington consumers does not differ in character from the movement of milk from farmer-producers in Virginia, Maryland, West Virginia, and Pennsylvania to the District of Columbia; both are directly in interstate commerce. But milk moving to the District of Columbia from the producers is not subject to regulation, according to the Virginia Milk Commission (R-95).

The Virginia Milk Commission does assert jurisdiction over prices paid farmer-producers by Virginia distributors in intrastate commerce (R 94-95); but if the Federal regulation were in effect, the jurisdiction over intrastate producer prices would be in the Department of Agriculture; see *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110.

This Court held, in *Highland Farms Dairy* v. *Agnew*, supra, that the Virginia Commission had no jurisdiction over milk prices from District of Columbia distributors to Arlington stores for resale.

When Congress gave the farmer-producers a choice whether there should be Federal regulation (7 U.S.C. 608c (16)), and the Federal regulation was rejected (R 28 A-31), an important part of milk price regulation was eliminated. Coordination of State and Federal schemes was made impossible; there is no statutory authorization for the State to regulate prices which would have been subject to regulation by the Department of Agriculture; and there is no authority in the Federal Statutes for any interstate regulation of milk prices by the States. In giving the farmer-producers a choice whether there should be regulation over

interstate commerce, there now is no statutory justification, neither Federal nor State, for regulation of interstate commerce in milk in the Arlington area.

The conclusion seems clear that Virginia has no jurisdiction over interstate traffic in milk in the Arlington area, and certainly not when there is no Federal regulation with which the State regulation could be correlated.

CONCLUSION

For the above reasons, the following conclusions are offered: (1) that the Virginia Milk and Cream Act does not authorize regulation over interstate traffic in milk from District of Columbia distributors directly to Arlington consumers, and that any regulation of such traffic is in violation of the Commerce Clause of the United States Constitution; and (2) that the State Milk Commission has no authority from Congress to regulate interstate milk prices, particularly in the absence of Federal regulation which was ousted by vote of the farmer-producers in 1947.

Therefore, it is respectfully submitted that the decree and judgment of the Courts below should be reversed.

Respectfully submitted,

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December 1953.

APPENDIX A

EXTRACTS, VIRGINIA MILK AND CREAM ACT, 1950 CODE OF VIRGINIA:

Section 3-359. "The (Virginia Milk) commission, after public hearing and investigation may fix the prices to be paid producers or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

Section 3-381. "No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto."

APPENDIX B

EXTRACTS: AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AS AMENDED, TITLE 7, U. S. CODE:

Section 601: It is declared that the disruption of the

orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

Section 608c (1): The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * * * *

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjust-

ments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for in this section:

* * * * * * *

Section 608c (16) (B): The Secretary (of Agriculture) shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the market-

ing area specified in such marketing agreement or order: Provided, That such majority have, during such representative period, produced for market more than 50 percentum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 percentum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

Section 610 (i): The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624, of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction

of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the porvisions of section 608d (2) of this title.

In The
Supreme Court Of The United States
OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

APPELLANTS' MEMORANDUM REPLY AS TO JURISDICTION

The following is submitted for appellant in reply to the portion of appellee's brief as to jurisdiction.

Appellee questions the jurisdiction of the U. S. Supreme Court to entertain this appeal on the contention that "appel-

lants have insufficient legal right or interest" to give them standing to appeal.

To be noted is the fact that this question was never raised before, neither by appellee in the courts below (R. 49-50, 128-148), nor in the decisions of the courts below (R. 50-52, 100-101, 148). As a matter of fact, everything below dealt with the question of interstate commerce, and no other issue was actually tried or subject of dispute or decision. It is significant that the State courts did not find any lack of capacity in appellants to try this matter in the State courts.

Appellee's counsel cite a number of cases in their brief (page 2) none of which need be considered as grounds for denying jurisdiction. None of the cases deal with the right of a local governing body to represent its citizens. This may be noted from the Revisors Notes, *U. S. Code Congressional Service*, page 1825. The remainder of the cases deal with appeals from orders of the Interstate Commerce Commission, which were governed by a different statute, not applicable to this case, brought forward in section 2323 of the present Judicial Code, Title 28 U. S. C. That statute restricted the parties which could obtain judicial review, and has been narrowly construed, as those cases show.

Jurisdiction in this case is conferred by section 1257, supra, which does not limit appeals by qualification of parties, and is very broad in conferring complete discretionary powers upon this Court to review decisions of State courts on constitutional grounds. That section reads as follows:

> Sec. 1257. "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as

follows:

* * * * * * *

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity."

There is no language in the statute which would justify the narrow limitation sought by appellee, nor any decisions to this effect under the above language, so far as the writer of this reply has been able to find.

As constitutional rights of a large group of people are involved, the Court should be sensitive to the practicalities involved. Assume, for illustration, that the average family in Arlington consumes two quarts of milk per day, or twice 365 quarts per year. The increase of price prescribed by appellee, in the order here questioned, was one-half cent per quart, or $3.65 per year for such family. This is too small an amount to justify any individual consumer litigating the constitutional question, nor even a large number of them. But multiplied by the 40,000 households in Arlington, the total sum is very large.

For every $1,000 spent in this appeal, the cost per Arlington family is only about 2½ cents. Collective action through the County Board provides a practical remedy; about the only practical remedy which the consumers actually have available.

The Arlington County Board, a responsible, continuing body corporate, consisting of elected representatives of the voters, and themselves representative consumers, is the

logical party to bring this sort of action. While it would be abhorrent of them to spend public funds merely to litigate their own personal interests as consumers, as a Board they can truly represent the people of the County in the preservation of their Constitutional rights.

The right of representatives to bring actions is not new. In the Girard College Case, *Vidal et al.* v. *Girard's Executors,* 2 Howard 127, 195, Justice Story pointed out the old rule of common law that the " 'king, as parens patriae, has a right by his proper officers, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases.' " Surely, constitutional rights are no less important than administration of charities.'

The right of representative parties to sue has been recognized by this Court in exceptional cases where numerous persons are involved, where it is impractical to bring them all before the court, and where the party bringing the action "may fairly be presumed to represent the rights and interests of the whole." *Smith et al* v. *Swormstedt* (the Methodist Book Concern case) 16 Howard 288, 302. Certainly, appellant County Board should qualify under this rule.

In *Hood & Sons* v. *Du Mond,* 336 U.S. 525, involving application of the Commerce Clause to milk regulation by a State, this Court said:

> "Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploit tion by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

But there will be no reality to this constitutional guarantee of freedom of trade and competition if this Court denies to the people of Arlington their only practical legal action to determine the issue.

Therefore, this Court is urged to follow the example of the Virginia courts by determining this case on the issues under the Commerce Clause, and not upon any technicality which would deny practical protection of the constitution to all residents of Arlington.

Respectfully submitted,

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